

Reasons the Federal and State Contractors should be Permittees

At the September 16, 2010 BDCP Principals Meeting the water contractors were tasked with providing a detailed discussion explaining why it is important and necessary for the CVP and SWP water contractors (Contractors) to be permittees under Section 10 of the ESA and under the NCCPA. The specific task was to summarize the practical and technical advantages of having the Contractors as permittees. The following is a summary of the lengthy discussions that the Contractors have had on the “permittee issue”.

Practical

1. Local Agency Accountability

The CVP and SWP contractors will be asked to invest between \$8 and \$12 Billion in the BDCP. It would be irresponsible for those local public agencies to commit to spending such large sums of public money without retaining the ability to participate in decisions about how it is spent. To adequately fulfill the fiduciary responsibilities of Contractors to their boards of directors and the public they serve they must participate in those decisions on equal footing with DWR and Reclamation.

2. Minority investors should not be the sole decision-makers

The overall cost of the BDCP is estimated at \$19 billion. The minimum share of that total that is likely to be paid by the Contractors is \$12 Billion, or 63% of the total projected costs. The combined state and federal share would be approximately 37% of the total costs. The BDCP decision-making structure should not allow the minority investor to be the sole decision-maker. The Contractors are not seeking to have a decision-making role that is proportional to their investment, but rather only a role that is equal to the decision-making role of the state and federal governments.

3. The Contractors can provide greater “investor confidence”

The ratepayers to whom the Contractors deliver water are the only certain source of funding for any BDCP conservation measure, and particularly for the construction of a new conveyance facility. It will require a significant increase in the confidence of those ratepayers that the BDCP will be implemented in a cost efficient manner, conscious of schedules and the costs of missing them, and employing personnel in whom they have confidence can plan, execute and complete the job. Neither the state nor federal governments have implemented a project of the BDCP’s size and scope in decades, and both agencies have lost some of their institutional capabilities. Those losses, which are likely to continue, are compounded by actual or perceived missteps in recent years, create caution and reluctance in the minds of the ratepayers that will ultimately decide whether or not to fund the BDCP.

Having the Contractors included as permittees will create a greater sense of confidence with ratepayers that the BDCP can be implemented more effectively and efficiently than is possible under the sole leadership of state and federal governments. It is very unlikely that sufficient confidence can be generated to motivate investment by ratepayers if only the state and federal governments are in control

of BDCP implementation.

4. The Contractors can carry out actions needed to ensure local agency cooperation with BDCP implementation.

As a permittee working on Delta habitat actions, the Contractors would have the ability to more effectively work with other local agencies, such as the Delta area counties, to ensure local cooperation. The state and federal governments have a long history with many of the local public agencies in the Delta and much of that history is viewed by those local agencies as unfavorable. Interestingly, the Contractors do not have long histories with the local public agencies and those local Delta agencies have shown a remarkable interest in recent months to deal directly with the Contractors.

The State and federal governments do not have the luxury of a clean slate with the local public agencies in the Delta, and while the Contractors also have some history, it is significantly less antagonistic than the relationship between the state and federal agencies and local Delta agencies.

5. The Contractors represents the water user community that is most directly and adversely impacted if the BDCP is not successful.

The Contractors will be either directly or indirectly responsible for funding billions of dollars in costs needed to implement the BDCP. Further, it will be their ratepayers and local communities, not State or federal government agencies that will be impacted if the environmental restoration and water supply goals of the BDCP are not achieved. For policy and equity reasons, it is acceptable within large multi-faceted HCPs/NCCPs for permit status to recognize the contributions and needs of multiple entities that fund implementation.

Both the state and federal governments work diligently to ensure the CVP and SWP function as well as possible. However, the consequences of failure and the benefits of success are not fully felt by either the state or federal agencies. As a result the acute risk and reward that motivates decisions is missing from the state and federal governments. The Contractors are the public agencies that benefit most directly from good decisions and suffer most significantly from poor decisions. The BDCP will include many decisions of varying importance and each of them should be made with the inclusion of the entities that largely pay for, benefit and suffer from them.

6. Making the Contractors permittees would not give them control over water operations.

The Contractors can be a permittee without limiting or affecting DWR's or Reclamation's authority with regard to water operations and without giving the Contractors a direct role in decisions regarding water operations. It is not uncommon within large multi-faceted HCPs/NCCPs for permit authorities to vary between permittees.

7. Making the Contractors permittees will not change the PREs role in preparing the BDCP.

Permittee status for the Contractors would define its role during implementation of the BDCP, but it would not change the Contractors role or the role of the PREs during preparation of the BDCP.

8. Federal Contractors cannot review Section 10 guarantees through the Bureau.

The CVP contractors are not afforded Section 10 assurances through Reclamation or DWR. Rather, they must be an equal participant as a permittee to receive those assurances. The CVP contractors will realize no benefit beyond the Section 7 standards unless they are also a permittee under Section 10.

Technical

1. The Contractors will likely be responsible for implementing significant elements of the BDCP.

If the Contractors are permittees, the fishery agencies will have direct access to and enforcement authority over the entity carrying out the habitat or other stressor actions to ensure its proper implementation. Permit status for the Contractors would mean that they would share a direct legal obligation to ensure compliance with the incidental take permits. The Contractors' commitment to fund or implement specific actions included in the BDCP would be directly enforceable terms or conditions of the incidental take permits.

While we understand that this objective could be accomplished through a contractual arrangement with DWR or Reclamation as the permit holders, we believe that a contractual arrangement would be of less legal weight and therefore inadequate when compared to the scope of the Contractors' involvement, which will include payment for and construction and operation of the new facility, very large scale habitat restoration projects, and implementation of other stressors measures that will impact parties who are not BDCP participants.

2. The Contractors are not subject to the vagaries of the state or federal budgeting processes.

Both the state and federal governments must pass annual budgets in order to pay employees. Both have shown an inability to do so with the kind of reliability that is needed for a project of this scope and magnitude.

The federal government has been unable to pass budgets and commonly relies on continuing resolutions as a stop-gap measure when its budgets are late. Impacts to funding can depend more on the mood of Congress than the needs of the project. While federal funding will be necessary to fully implement the BDCP, the federal government is an unreliable way to fund the core needs of staffing at the Implementation Office.

The state government has also shown an inability to fund its workforce. Recent years have seen late budgets and political gamesmanship with state worker payrolls that are unacceptable for a project that will require certainty to meet its payroll. The Legislature's recent efforts to change SWP priorities through the budget process coupled with the Administration's willingness to impose furloughs, require overtime reductions and threaten pay reductions to federal minimum wage levels demonstrate the deteriorating ability of the state to carry out large complex projects over extended periods.

The Contractors have the ability to fund their own staff and the staff of the Implementing Office. IO staff funded by the Contractors would not be limited by state or federal budgetary concerns, pay scales, hiring processes, or the uncertainty of meeting payroll.

3. The Contractors are able to make payments that the state and federal governments cannot.

The BDCP is expected to impact some local jurisdictions as it constructs new facilities and habitat restoration projects. Those impacts are likely to require payment of taxes and other local agencies' fees from which the state and federal governments have traditionally exempted themselves or are simply unable to generate through their budget processes. The common example is payment-in-lieu-of-taxes payments (PILT). In many, many cases these payments are far in arrears and are unlikely to ever get paid.

The Contractors have the ability to make these payments and others like them on a regular and expectable schedule. The BDCP is a controversial project. It cannot afford to damage relationships with local governmental agencies and their citizens by delaying or refusing to make expected payments for local fees or taxes.

4. The Contractors can attract and hire staff that would be unavailable to the state or federal governments.

The size and scope of the BDCP is too large to be run under the constraints of the state and federal hiring practices and salary structure. The BDCP will be the largest ecosystem restoration project and the largest water supply construction project in the nation. Implementing a project of the size and scope of the BDCP has never been done before by DWR or the Bureau in their modern age. It will be essential to hire project managers and staff that are capable of successfully implementing very, very large scale construction and restoration projects. Attracting managers with prior experience working on this scale and performing at that level will necessitate salaries outside the range of state or federal pay scales. The Contractors are able to hire exceptional staff and to pay competitive salaries for those unique personnel.

Accountability of the Program Manager and his or her deputies is an associated concern. Under state and federal labor rules it can be difficult or impossible to fire state or federal employees. The Contractors are able to hire "at will" employees that can be directly accountable to the program manager. The ability to hold the BDCP's high level managers accountable through standard "at will" employment rules significantly improves the accountability of project managers to the BDCP implementing entities.

The very high level of accountability necessary to motivate aggressive implementation of the BDCP is not available under the state and federal labor rules.

5. In addition to the technical reasons above, the Contractors can also provide several other services, and expertise in implementing the BDCP.

The ability to buy and hold property
The interest and ability to defend the BDCP against legal challenges
The ability to contract for services in a timely manner
Expertise in management of large complex projects and programs
Expertise in management of large ecological preserves
Expertise in management of HCPs NCCPs and CESA permits
Expertise in land acquisition and permitting
Expertise in financial management of large projects and programs
Expertise in public outreach